No. 13671

In the
United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

WATERFRONT EMPLOYERS OF WASHINGTON; LOCAL 19, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION; and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, *Respondents.*

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR RESPONDENT WATERFRONT EMPLOYERS OF WASHINGTON

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EDWARD G. DOBRIN,
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INDEX

TABLE OF CASES

STATUTES

MISCELLANEOUS

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JURISDICTIONAL STATEMENT

This case is before the Court on petition of the National Labor Relations Board, herein called the Board, pursuant to Section 10(e) (29 U.S.C.A. §160(e)) of the National Labor Relations Act, as amended (29 U.S.C.A. §151, *et seq.*), herein called the Act, for enforcement of its order of February 26, 1952, and its supplemental order of November 4, 1952, issued against respondents Waterfront Employers of Washington, herein called WEW; International Longshoremen's and Warehousemen's Union, herein called ILWU; and Local 19, International Longshoremen's and Warehousemen's Un-

ion, herein called Local 19. This Court has jurisdiction of the petition by virtue of the provisions of Section 10(e) of the Act (29 U.S.C.A. §160(e)). Pertinent provisions of the Act are set forth in Appendix A hereto. References hereinafter made to Section numbers refer to Sections of the Act unless otherwise specified.

STATEMENT OF FACTS

A. The business of WEW.

WEW is a non-profit corporation organized under the laws of the State of Washington, having its principal office in Seattle, Washington. WEW offers membership to some firms directly or indirectly engaged in commercial transportation or handling of goods by or over water, rail, truck, docks or warehouses. One of the purposes for which WEW exists is to represent employer-members in collective bargaining relations with labor organizations representing longshoremen and other shore employees (R. 28, 42). Some employer-members of WEW operate ocean-going vessels engaged in the transportation of passengers and freight and some employer-members of WEW perform stevedoring services for companies operating such vessels (R. 42). Those eligible for membership in WEW are steamship companies, terminal companies, stevedore contracting companies in the State of Washington and north of the Columbia River (R. 187).

B. Statement of the pleadings.

These cases against WEW were initiated by the filing of unfair labor practice charges by Albert G. Crum on June 14, 1949 (R. 15-16), and by Clarence Purnell on

June 22, 1949 (R. 19-20). An amended charge was filed by Crum against WEW on December 1, 1950 (R. 17-18). An amended charge and a second amended charge against WEW were filed by Purnell on September 21, 1949, and on November 30, 1950, respectively (R. 21-6). Unfair labor practice charges were filed against ILWU by Crum and against Local 19 and ILWU by Purnell (R. 1-15).

On behalf of the General Counsel for the Board, the Regional Director, Nineteenth Regional Office of the Board, issued a consolidated complaint (R. 27-40) against WEW, five of its individual member companies, ILWU, and Local 19. The consolidated complaint alleged in substance that WEW was an employer within the meaning of the Act and was engaged in commerce within the meaning of the Act; that ILWU and Local 19 were labor organizations within the meaning of the Act; that on or about December 17, 1948, and February 26, 1949, WEW, on behalf of its members, entered into certain collective bargaining agreements with ILWU and Local 19, respectively, which contained certain allegedly illegal preferential hiring provisions; that since December 17, 1948, WEW had contributed moneys to support of a central hiring hall for dispatching longshoremen and dock workers in Seattle; that all employers of longshoremen and dock workers in Seattle procured longshoremen only through the hiring hall; that WEW acquiesced in and assented to a practice whereby the respondents ILWU and Local 19 were permitted to exercise control over the selection and dispatching of persons dispatched from the said hiring hall; that members of Local 19 and ILWU were ac-

corded preference of employment in the operation of the hall, and that Local 19 and ILWU refused to dispatch Albert G. Crum and Clarence Purnell to work on the waterfront because the said individuals were not members in good standing in said unions; that as a result of certain of the foregoing allegations, WEW allegedly engaged in unfair labor practices within the meaning of Sections 8 (a) (1), 8 (a) (2), and 8 (a) (3); that by virtue of certain of the foregoing allegations the respondent unions allegedly engaged in unfair labor practices within the meaning of Sections 8 (b) (1) (A) and 8(b) (2).

Answers to the consolidated complaint were duly filed by all parties. The answer and amended answer of WEW admitted certain facts relating to the business of WEW; admitted the execution of the collective bargaining agreements; admitted that ILWU and Local 19 are labor organizations within the meaning of the Act; but denied in all respects the substantive allegations of the complaint and in particular denied that WEW had engaged in the commission of any unfair labor practices as alleged (R. 41-44, 49-50). The answers of ILWU and Local 19 denied all substantive allegations of the complaint (R. 45-46, 50-55).

At the opening of the hearing certain motions were made by WEW and Local 19 relating to the timeliness of certain allegations of the complaint under the provisions of Section 10(b) (R. 178-181).

On April 6, 1951, the Trial Examiner issued his Intermediate Report and Recommended Order (R. 55-112). Exceptions were duly filed to said report and

order by WEW (R. 112-121), by ILWU (R. 127-29), by counsel for the General Counsel of the Board (R. 121-24) and by the charging parties (R. 124-27).

On February 26, 1952, the Board issued its Decision and Order (R. 130-170) and subsequently issued its Supplemental Decision and Order (Petitioner's Brief, App. A). The Board subsequently filed in this Court its petition for enforcement of its order and supplemental order (R. 601-04). Answers to the petition have been filed in this Court by WEW (R. 608-625), by Local 19 (R. 625-29) and by ILWU (R. 630-32).

C. The agreements involved.

These cases involve in part the provisions of the Pacific Coast Longshore Agreement (R. 229-268), herein called the Coast Agreement, entered into between Waterfront Employers Association of the Pacific Coast, a coast-wide association of employers, and ILWU, and the provisions of the Dock Workers' Agreement for Port of Seattle (R. 268-298), herein called the Dock Agreement, entered into between WEW and Local 19.

The Coast Agreement provides in part as follows (R. 248):

> "(d) Preference
>
> "Preference of employment shall be given to members of the International Longshoremen's and Warehousemen's Union whenever available. Preference applies both in making additions to the registration list and in dispatching men to jobs. * * * "

The Dock Agreement provides in part as follows (R. 285):

> "(c) Preference

> "Preference of employment shall be given to members of the Union whenever available. Preference applies both in making additions to the registration list and in dispatching men to jobs. * * * "

The events involved in these cases occurred at the conclusion of and immediately following the Pacific Coast maritime strike in the fall of 1948. Negotiations were held in the fall of 1948 between Waterfront Employers Association of the Pacific Coast and ILWU in San Francisco on the provisions of a new Pacific Coast-wide longshore agreement. The Coast Agreement, including the hiring provision thereof, set forth the terms agreed upon between Waterfront Employers Association of the Pacific Coast and ILWU under which work was resumed when the strike terminated on December 6, 1948 (R. 217-18). The Dock Agreement was subsequently negotiated between WEW and Local 19, and was executed by said parties on February 26, 1949 (R. 226).

In approximately March of 1949 Pacific Maritime Association, herein called PMA, was formed to replace the Coast Association and other local associations (R. 224).

D. Hiring hall structure and administration of the hiring halls.

The Coast Agreement and the Dock Agreement provide that hiring of longshoremen and dock workers by employers shall be through central hiring halls in the various ports. The hiring hall established in Seatle pursuant to the agreements is involved in this case. The Coast Agreement provides in part as follows (R. 246):

"(a) Hiring Hall

"(1) The hiring of all longshoremen shall be through halls maintained and operated jointly by the International Longshoremen's and Warehousemen's Union and the respective Employers Associations. The hiring and dispatching of all longshoremen shall be through one central hiring hall in each of the ports, with such branch halls as shall be mutually agreed upon in accord with provisions of Section 14(c). All expense of the dispatching halls shall be borne one-half by the International Longshoremen's and Warehousemen's Union and one-half by the Employers."

A provision in the Dock Agreement provides that the hiring of all dock workers shall be through the hiring halls set up and administered by the Coast Association and the ILWU under the Coast Agreement. Section 8(a) (1) of the Dock Agreement states (R. 284):

"(a) Hiring Hall

"(1) The hiring of all dock workers shall be through the central hiring hall maintained and operated jointly by the *International Union and the Coast Association.*" (Emphasis supplied)

The maintenance and operation of the hiring hall, for purposes of administering both the Coast and Dock Agreements, is accomplished through Port Labor Relations Committees for each Port (R. 260, 291). Such a Port Labor Relations Committee existed in Seattle, consisting of three representatives designated by the employers and three representatives designated by the union (R. 260, 224, 474-7). One of the functions of the Port Labor Relations Committee is to maintain and control lists of registered longshoremen and dock work-

ers in each Port, such registered longshoremen and dock workers being entitled to preference of employment (R. 248, 284, 476-7). A longshoreman or dock worker whose name appears on the registered list in the Port of Seattle is entitled to be dispatched from the hiring hall as a longshoreman or dock worker (R. 477).

Personnel for each hiring hall, with the exception of dispatchers, are determined and appointed by the Port Labor Relations Committee; dispatchers are selected by the union through elections in which candidates qualify for the job according to the standards prescribed and measured by the Port Labor Relations Committee (R. 247).

WEW is a separate and distinct entity from the Coast Association of Employers. The Coast Association is presently PMA and prior to its existence, was Waterfront Employers Association of the Pacific Coast. WEW performs separate and distinct functions from the Coast Association (R. 214). The principal function performed by WEW is and was the maintenance of a central pay office and central records bureau for paying longshoremen and dock workers on a consolidated check system with funds furnished by employers, all of whom were not members of PMA (R. 187-8, 322-3, 330-4, 352-3). WEW has not, as an association, at any time participated in the functions of the Port Labor Relations Committee, or in the maintenance or operation of the hiring hall in Seattle (R. 325-330, 337, 349-50, 473-5). WEW did not at any time represent employers of longshoremen in the Port of Seattle for purposes relating to the hiring hall functions under the Coast and Dock Agreements (R. 325, 330).

The entire operation, maintenance and management of the central hiring hall is and always has been under the Port Labor Relations Committee as a function of the Coast Association, now PMA, and prior to its existence, Waterfront Employers Association of the Pacific Coast. Employer representatives on the Port Labor Relations Committee for Seattle were designated by and acted as representatives of the Coast Association and not of WEW (R. 223-4, 475-6, 325,330, 337, 349-352). Expenses of the hiring hall are paid one-half by funds obtained from the Coast Association and one-half by the union (R. 322, 354-6). Revenues for paying the employers' share of the expense incurred in operating the hiring hall, including the Seattle hiring hall, are secured by PMA, and formerly by Waterfront Employers Association of the Pacific Coast, through tonnage assessments and/or man hour charges levied against members of the Coast Association (R. 322, 460-1). Member companies of WEW were not all members of PMA or of Waterfront Employers Association of the Pacific Coast, and may or may not have been such members (R. 327). Allocation of employees among employers in Seattle at times of manpower shortages is and was a function of the Coast Association and not of WEW (R. 328-330, 342-7).

WEW does not and has not participated in the administration of or enforcement of the hiring and registration provisions of the Coast and Dock Agreements, or in the maintenance and operation of the Central Hiring Hall in Seattle, or in the functions of the Port Labor Relations Committee for Seattle.

E. Facts relating to Albert G. Crum.

Mr. Crum was registered as a longshoreman in the Port of Seattle and placed on the Port registration list on August 3, 1939 (R. 478-9). He commenced working on the waterfront in April, 1936 (R. 359) and became a member of Local 19 in 1939 (R. 360). So far as the record indicates, he is still a member of Local 19 (R. 360). During the period he was engaged in longshore work Crum spent all but a brief interval as a "gang" man (R. 363-5).

Following the maritime strike of 1948 (September 1-December 6) Crum appeared before the Executive Board of Local 19 at its union hall. The Executive Board assessed a fine against him for failure to picket during the strike (R. 367-370). Crum was advised by one Hopkins, president of Local 19 and chairman of its Executive Board (R. 368-9), that he would have 30 days in which to pay the fine and Hopkins further advised Crum "you will be taken off the work list from this date on until the fine is paid" (R. 370). Crum was subsequently informed by the then secretary of Local 19, one Bill Clark, that he could not work until the fine was paid (R. 371-2). Crum was, however, shortly thereafter advised by Bill Gettings, Regional Director for ILWU, that under the union constitution he could work for 30 days (R. 371-2, 402-04, 566-8). Crum then continued to work with the gang until January 27, 1949 (R. 373). The next day Crum called the dispatching hall, as was customary, and was advised that his gang was not then working pursuant to the earnings equalization system (R. 374). This kept on for three or four days and he was then told by an unidentified person,

when he called the dispatching hall, as follows: "Crum, there is no need of your calling up any more. There is a bug behind your name, and you won't be dispatched with your gang until the fine is paid" (R. 374-5).

Crum made no attempt to obtain dispatch (R. 391-2) although he knew it was his responsibility as a gang man to call the hiring hall or check at the dispatching office to obtain work orders (R. 381-2).

On April 20, 1949, the Port Labor Relations Committee voted to cancel Crum's name from the registration list of the Port (R. 479-83). The proposal that Crum's name be so removed was made by the union representatives on the Committee because it was alleged that Crum was a part-time worker in the industry (R. 484). The employer-members of the Committee caused their pay records to be checked and ascertained that Crum's earnings were low compared to those of other longshoremen in the Port (R. 483-99). This procedure with respect to removing Crum's name from the registration list was the customary and normal procedure followed by the Port Labor Relations Committee, each side having the right to suggest and as a matter of practice suggesting changes in the registration list of the Port (R. 477-8).

The action of the employer-representatives on the Port Labor Relations Committee in voting to cancel Crum's name from the registration list was in conformity with an understandable, consistent and long-standing policy "to have people on the registered list who present themselves in a normal fashion to take their work opportunities, and to examine from time to time

people who do not''; the employers desired ''people on the Registration List who will be full time workers'' (R. 482-3). The earnings record clearly establishes the fact that Crum was not making himself available regularly for work opportunities in the Port (R. 484-501) and Crum admitted that he had acquired a farm in Idaho on which he spent substantial periods of time during years here material (R. 383-90). Crum admitted that in the summer (July) of 1948 he returned to Seattle from his farm in Idaho for a brief time and went to the hiring hall; that he did not then want to work but was ''drafted'' for a week's work, against his will, because of a shortage of men in the port (R. 388-90).

Crum was in no sense singled out, so far as employer-members of the Port Labor Relations Committee were concerned, for deregistration. A number of other men were deregistered in the years 1948-49 because they were not making themselves available regularly for work (R. 501-04).

Following the action of the Port Labor Relations Committee of April 20, 1949, Crum's name was removed from the gang list at the hiring hall by chief clerk Laing (R. 573-4). At all times prior to April 20, 1949, Crum's name was on the registration list for the Port of Seattle and no instructions were given to the dispatchers by any employer-representatives not to dispatch him (R. 498-9). As a registered longshoreman, under the established rules and practice of the Port Labor Relations Committee, Crum was entitled to be dispatched to longshore and dock work (R. 477-8, 507-8, 514).

Crum contacted Mr. Cornell, then Area representative of PMA and secretary of WEW, presumably in February, 1949 (R. 390-1). Crum advised Cornell that he had been fined by the union. Crum stated that the reason he contacted Cornell was only that he "wanted to see if there was anything that the WEW could do to have me reinstated in good standing with the local" (R. 375-6). Crum did not advise Cornell, at any time, that he had not been dispatched. Cornell checked Crum's record, at which time Crum was still on the registered list and told Crum there was nothing in the record against him (R. 376, 504-06). Cornell did not recall whether or not on April 20, 1949, when Crum's name was brought up before the Port Labor Relations Committee, he had the previous conversation with Crum in mind but that, in any event, his vote and recommendation to cancel Crum from the registration list would not have been any different in view of Crum's past record of low earnings (R. 506-7).

F. Facts relating to Clarence Purnell.

Clarence Purnell became a registered longshoreman in the Port of Seattle on November 27, 1942 (R. 507). He was employed in the capacity of "bull driver" during most of the time he worked on the waterfront (R. 413). Purnell became a member of Local 19, presumably in September, 1943, and so far as the record indicates, is still a member (R. 413-4).

Purnell was a "plug board" man and obtained his jobs by appearing at the hall and "plugging in" on the board (R. 360-63, 414-17). Purnell is still on the Port registered list (R. 507-8, 510) and has been on the list

since 1942 (R. 508-9). His name is still on the "plug board" at the hiring hall, has never been removed, and he has at all times been eligible for dispatch to work opportunities (R. 569-70) under the rules and practices established by the Port Labor Relations Committee (R. 477-8, 507-8, 514).

Purnell testified that following the 1948 maritime strike, probably in the early part of December, 1948, he went before the Executive Board of Local 19 (R. 417-18). Purnell was advised by Hopkins, President of Local 19, that he was fined for lack of picket duty during the strike (R. 418-20), and that he would have 30 days in which to pay the fine (R. 419-20). Purnell subsequently called Laing, clerk at the Local 19 Office, sometime in January and was told he had 30 days to work (R. 420-1). Laing is chief clerk in the hiring hall office, not the chief dispatcher (R. 584), as the Board incorrectly asserts throughout its brief. Purnell also called the secretary of Local 19 immediately thereafter (R. 421). At that time Purnell was seeking a statement which would enable him to draw unemployment compensation or look for another job (R. 421, 570-73).

Purnell contacted Cornell, area representative of PMA and secretary of WEW, by telephone about two weeks after he went before the Executive Board (R. 428-9). Purnell asked Cornell *only* if his record was clear with Waterfront Employers (R. 429). Cornell advised him that his record was clear (R. 429), his name then being on the registered list for the Port (R. 510).

Purnell admitted in his testimony that he did not do any longshore work after his appearance before the

Executive Board of Local 19 (R. 420) and that he made no attempt whatever to get work by appearing at the hall and "plugging in" on the plug board in the normal and customary fashion, after his appearance before the Executive Board of Local 19 (R. 420-25, 414-16, 442). The practice in the industry has always been for plug board men to make themselves available for employment by personally appearing at the hiring hall and "plugging in" (R. 360-63, 414-16).

The Conclusions of the Trial Examiner

On the basis of the facts, the Trial Examiner concluded that the Coast Agreement and Dock Agreement contained preferential hiring clauses beyond the permissible limits prescribed in Section 8(a)(3). He concluded that by virtue of the execution of the Coast and Dock Agreements, WEW violated Sections 8(a)(1) and (3) (R. 78-9); by virtue of the execution of the Dock Agreement, Local 19 violated Sections 8(b)(2) and 8(b)(1)(A) (R. 82).

With respect to the alleged violation by WEW of Section 8(a)(2), the Trial Examiner recommended that all such allegations in the complaint be dismissed (R. 79-81).

With respect to Crum, the Trial Examiner concluded that Crum's charge against Local 19 was barred by the limitation period specified in Section 10(b) (R. 75-6) He further concluded that Crum was refused employment on January 27, 1949, as a longshoreman because his union membership had been terminated for reasons other than failure to tender periodic dues and initiation fee uniformly required as a condition of acquiring or

retaining membership and in order to encourage membership in Local 19. This refusal constituted a violation of Sections 8(a)(3), 8(b)(2) and 8(b)(1)(A) (R. 96). The Trial Examiner concluded that WEW was responsible for the discrimination against Crum and thus violated Section 8(a)(3) (R. 96, 99). He concluded that ILWU had no part in the enforcement of the Coast or Dock Agreements and therefore refused to attribute to ILWU responsibility for the refusal to employ Crum (R. 97). The Trial Examiner concluded that, although Local 19 had caused WEW to discriminate against Crum and was responsible therefor (R. 97, 99), Crum's charges against Local 19 were not timely filed under Section 10(b) and must therefore be dismissed (R. 75-6, 99).

The Trial Examiner further concluded, however, that Crum was deregistered by the Port Labor Relations Committee on April 20, 1949, for nondiscriminatory reasons and that the discrimination against him ended on April 20, 1949 (R. 99, 102).

With respect to Purnell, the Examiner concluded that his charge against ILWU was barred by the limitation period specified in Section 10(b) (R. 77). He concluded that neither WEW nor Local 19 violated the Act with respect to Purnell, finding that Purnell did not apply for employment through the hiring hall following September, 1948 (R. 93-4, 99-100).

The Conclusions of the Board

The Board in its decision and order substantially disagreed with the Trial Examiner. The Board concluded that by virtue of the execution and enforcement

of the Coast Agreement and Dock Agreement containing unlawful preferential hiring provisions in favor of union members, WEW engaged in unfair labor practices within the meaning of Sections 8(a)(1), (2) and (3) (R. 134-6, Petitioner's Brief, App. A). The Board also concluded that by virtue of the execution and enforcement of the Dock Agreement, Local 19 engaged in unfair labor practices within the meaning of Sections 8(b)(2) and 8(b)(1)(A) (R. 134-6).

With respect to Crum and Purnell, the Board found that each had been discriminatorily refused dispatch from the hiring hall pursuant to the preferential hiring provisions of the Coast Agreement (R. 139-147). The Board likewise held that the refusal to dispatch Crum and Purnell was attributable to WEW and that WEW had therefore engaged in unfair labor practices within the meaning of Sections 8(a)(3) and (1) (R. 148-50). The Board held that Local 19 was directly responsible for the refusal to dispatch Crum and Purnell and that Local 19 had therefore engaged in unfair labor practices within the meaning of Sections 8(b)(2) and 8(b)(1)(A) (R. 147), for which ILWU was likewise held responsible (R. 147-8).

The Order of the Board

The Board ordered WEW, its officers, agents, successors and assigns to cease and desist from: (1) discriminating in the hire and tenure of employment of employees by (a) maintaining in effect, or participating in any manner in the enforcement of the union security provisions of the Coast Agreement and the Dock Agreement; or (b) entering into, renewing, or participating

in the enforcement of, any like or related agreements or arrangements which require union membership as a condition of employment, unless such agreement or arrangement conforms to the requirements of Section 8(a)(3); (2) in any other manner, interfering with, restraining, or coercing employees of its employer-members in the exercise of the rights guaranteed them in Section 7, except to the extent that such rights may be affected by an agreement made in accordance with the provisions of Section 8(a)(3), requiring membership in a union as a condition of employment (R.157-8).

The Board further ordered WEW to take the following affirmative action which the Board found would effectuate the policies of the Act: (1) jointly and severally with Local 19 and ILWU make whole Crum and Purnell for any loss of pay suffered by them by reason of the discrimination against them; (2) notify the Port Labor Relations Committee and the dispatchers of the Seattle, Washington, hiring hall, in writing, furnishing copies to Crum and Purnell, that the hiring hall dispatchers (a) are not to give force or effect to those provisions of the Coast and Dock Agreements authorizing preferential dispatch of members of ILWU and Local 19; (b) are not to discriminate in any other manner in the hire and tenure of employment through the hiring hall because of failure to acquire or retain membership status in Local 19 and ILWU, and (c) are to make promptly available to Crum and Purnell all dispatch privileges of the hiring hall upon request, and in Crum's case, without regard to the "deregistration" action of April 20, 1949; (3) notify in writing, each of the employer members of WEW of the terms of the

Board's order and request that each of them take all steps necessary to insure that the dispatchers of the hiring hall will not discriminate against any applicant for employment because of his failure to acquire or retain membership status in ILWU or Local 19; (4) invoke such powers and rights as it may have as to each member of WEW who employs longshoremen or utilizes the hiring hall in order to discharge its financial obligation as to back pay, and to insure cooperation of individual employers in effectuating the terms of the order; (5) post notices in its business offices and in the Seattle hiring hall (R. 158-161).

The Board ordered Local 19 and ILWU to cease and desist from (1) giving effect to the union security provisions of the Coast and Dock Agreements to which they are a party, and/or participating in enforcement of such union security arrangements, whether or not they are signatory parties thereto; (2) entering into, renewing or agreeing to, or participating in, enforcement of any like or related union security agreement or arrangement, unless such arrangement or agreement conforms to the provisions of Section 8(a)(3); (3) in any other manner, requiring, directing or inducing dispatchers of the Seattle, Washington, hiring hall to discriminate in granting dispatch privileges to Crum and Purnell or any other employee because of their failure to acquire or attain membership status in Local 19 and ILWU unless an agreement authorizing imposition of union membership as a condition of employment is made in accordance with the provisions of Section 8(a)(3); (4) in any other manner, causing or attempting to cause the employers who utilize the hiring hall to dis-

criminate in hire and tenure of employment in violation of Section 8(a)(3); (5) in any other manner restraining or coercing employees or prospective employees of the employers who utilize the hiring hall in the exercise of rights guaranteed employees under Section 7, except to the extent that such rights may be affected by an agreement made in accordance with the provisions of Section 8(a)(3) requiring membership in a union as a condition of employment.

The Board ordered Local 19 and ILWU to take the following affirmative action which the Board found will effectuate the policies of the Act: (1) jointly and severally, and jointly and severally with WEW, make whole Crum and Purnell for loss of pay suffered by them as a result of discrimination against them; (2) notify WEW, the Port Labor Relations Committee, the Seattle hiring hall dispatchers, and employers who utilize the hiring hall, in writing, with copies to Crum and Purnell, that the hiring hall dispatchers (a) are not to give force or effect to the preferential hiring provisions of the Coast and Dock Agreements; (b) are not to discriminate in any other manner in the hire and tenure of employment of any applicant for employment through the hiring hall because of his failure to maintain membership status in ILWU and Local 19, and (c) are to make available to Crum and Purnell all dispatch privileges of the hiring hall upon request, and in Crum's case without regard to the "deregistration" action of April 20, 1949; (3) notify and direct the representatives who are members of the Seattle Port Labor Relations Committee to take such action as is necessary to restore Crum to the Port registration lists;

(4) post in the Seattle hiring hall and in their business offices appropriate notices (R. 161-64).

SPECIFICATION OF ERRORS RELIED UPON

It is the position of WEW that the following conclusions of the Board, and all findings and conclusions subsidiary thereto upon which such conclusions are based, are not supported by substantial evidence on the record considered as a whole, are not supported by the findings, and are contrary to law, and for that reason the portions of the Board's order predicated thereon are improper and beyond the power of the Board:

1. That unfair labor practice charges against WEW based upon execution of the Coast and Dock Agreements were timely filed under Section 10(b).

2. That by execution and enforcement of the Coast and Dock Agreements, WEW violated Sections 8(a)(1), (2) and (3).

3. That Crum and Purnell were discriminatorily denied dispatch through the Seattle hiring hall in violation of Sections 8(a)(1) and 8(a)(3), and Sections 8(b)(2) and 8(b)(1)(A).

4. That the discriminatory refusal, if any, to dispatch Crum and Purnell, or liability therefor, is attributable to WEW and that WEW has therefore engaged in violation of Sections 8(a)(3) and (1).

5. That WEW was responsible for discrimination, if any, against Crum and Purnell.

6. That WEW knew of, acquiesced in, or consented to any established practice not to dispatch any men,

including Crum and Purnell, from the hiring hall because of union fines assessed against them.

7. That the deregistration of Crum by the Port Labor Relations Committee on April 20, 1949, was not in good faith, and, even if in good faith, does not act as a bar to an unconditional reinstatement and back pay order.

It is the further position of WEW that the Board's order in its entirety is improper as against WEW, and especially in the following particulars, to-wit: In ordering WEW, its officers agents, successors and assigns, or any of them to:

(a) cease and desist from maintaining in effect or participating in any manner in the enforcement of the union security provisions of the Coast Agreement and of the Dock Agreement, as provided;

(b) cease and desist from entering into, renewing or participating in the enforcement of, any like or related agreements or arrangements, as provided;

(c) cease and desist from in any other manner interfering with, restraining or coercing employees of its employer-members, as provided;

(d) jointly and severally with Local 19 and ILWU, or in any manner, make whole in any manner, Crum and Purnell, or either of them, for any loss of pay whatsoever;

(e) take any measures to restore to Crum and Purnell, or either of them, any dispatch privileges of the hiring hall;

(f) send any notices and/or requests whatsoever to

the Port Labor Relations Committee, or to the hiring hall dispatchers at the Seattle, Washington, hiring hall, or to any employers of employees covered by the Coast and Dock Agreements, as provided;

(g) invoke its powers and rights with respect to its members, or any of them, to discharge any obligations under the order or to insure cooperation of each or any such employer in effectuating the terms of the order as provided;

(h) post any notices whatsoever in its business offices or in the hiring hall.

It is the further position of WEW that the Board erred in failing to adopt or give effect to credibility findings of the Trial Examiner.

It is the further position of WEW that, if discrimination occurred against Crum and Purnell, or either of them, the Board erred in failing to find ILWU or Local 19, or both, responsible therefor and in failing to order that only Local 19 or ILWU, or both, should make whole Crum and Purnell, or either of them, for any loss of wages sustained as a result thereof.

ARGUMENT

Summary of Argument

No charges of unfair labor practices alleging that WEW engaged in violations of the Act by executing the Coast or Dock Agreements were timely filed under Section 10(b). The allegations of the complaint and the findings and conclusions of the Board predicated upon execution of the Coast and Dock Agreements cannot be sustained.

The Board improperly found and concluded that Crum and Purnell were discriminated against in violation of Sections 8(a) (3) and (1), that such discrimination is attributable to WEW, and that Local 19 and ILWU caused such discrimination in violation of Sections 8(b) (2) and (1)(A). Substantial evidence on the record considered as a whole does not support the finding that Crum and Purnell were refused dispatch through the hiring hall, for discriminatory reasons or otherwise. In January and February, 1949, Crum and Purnell were at all times registered longshoremen entitled to be dispatched to longshore and dock work in Seattle under the system of hiring established by the Port Labor Relations Committee under the Coast and Dock Agreements. Neither Crum nor Purnell sought dispatch through the hall in the customary manner. Crum was subsequently deregistered on April 20, 1949, by the Port Labor Relations Committee for nondiscriminatory reasons.

Even if a refusal to dispatch Crum or Purnell occurred as alleged, representatives of WEW had no knowledge thereof and did not acquiesce in or consent thereto. In the absence of knowledge, acquiescence or consent, it is obvious that there can be no finding that WEW *discriminated* against Crum or Purnell within the meaning of Sections 8(a) (3) or (1), or that Local 19 or ILWU caused WEW to discriminate against either Crum or Purnell in violation of Sections 8(b) (2) and (1)(A). The mere existence of preferential hiring provisions in an agreement does not prove a case of discrimination against a specific individual, for obvious-

ly, all hiring practices under the agreement could be perfectly lawful.

If refusals to dispatch Crum or Purnell occurred as alleged, such action represented unilateral acts by Local 19 and ILWU wholly unauthorized under the hiring system established by and under the control of the Port Labor Relations Committee. Such coercive action by Local 19 and ILWU was entirely outside the system of dispatching established under the Coast and Dock Agreements, and WEW has no responsibility therefor.

The administration and enforcement of the Coast and Dock Agreements and participation in the operation of the Port Labor Relations Committee and the hiring hall were never functions of WEW but were functions performed at all times by Waterfront Employers Association of the Pacific Coast and its successor, PMA, and with which WEW had no connection at all. WEW cannot therefore be found responsible for any alleged discrimination against Crum or Purnell.

There is no independent general evidence that WEW *enforced* the Coast or Dock Agreements and no finding can be sustained that WEW engaged in violations of Sections 8(a) (1), (2) and (3) by its enforcement of such agreements.

If Crum and Purnell, or either, were discriminated against, the Board erred in failing to assess all back pay liability, if any, against Local 19 and ILWU. Under the proviso to Section 10(c), Local 19 and ILWU were in fact the parties responsible for any coercive action against Crum and Purnell. Adherence to the Board's "joint and several liability" formula, pursu-

ant to which the employers are held jointly and severally responsible for back pay with the unions, will clearly not effectuate the purposes of the Act in this case and cannot be sustained.

If Crum were discriminated against, the Board erred in failing to give any effect, in ordering its remedy, to the deregistration of Crum for nondiscriminatory reasons by the Port Labor Relations Committee on April 20, 1949. To order Crum reinstated to hiring privileges, and to order back pay in his favor following April 20, 1949, is to make Crum whole for a discrimination he never suffered and is contrary to the remedial purposes of the Act.

I. No charges of unfair labor practices based upon execution of the Coast or Dock Agreements were timely filed against WEW under Section 10(b).

Section 10(b) provides as follows:

> "Sec. 10(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, * * * ."

The complaint alleged (R. 36) and the Board found and concluded (R. 135, Petitioner's Brief, App. A) that WEW engaged in unfair labor practices within Sections 8(a) (1), (2) and (3) by entering into or executing the Coast and Dock Agreements. No timely charges of unfair labor practices based on execution of the agreements were filed under Section 10(b) upon which the allegations of the complaint or the findings and conclusions of the Board in this respect can lawfully be predicated. This issue was raised by motions of the respondents during the course of the hearing (R. 178-9, 462-3); the motions were denied (R. 179, 463).

A. *The charges relating to execution of the Coast Agreement.*

Analysis of the charges and consideration of the evidence in these cases establishes that the Coast Agreement, and the hiring provision thereof, was agreed upon and became effective more than six months prior to the filing of *any* charge in these cases.

The first charge in these cases was filed against WEW on June 14, 1949 (R. 15). The charges themselves affirmatively assert (R. 15, 19) and the evidence establishes that the provisions of the Coast Agreement, insofar as here material, had been agreed upon and were effective upon resumption of operations on December 6, 1948, following the 1948 maritime strike (R. 216-18). This evidence is undisputed. The Coast Agreement itself is dated December 6, 1948, and became effective by its own terms on December 6, 1948 (R. 229).

The Board found and concluded that the date of December 17, 1948, was significant. At that time the par-

ties initialed the Coast Agreement. The Board concluded that the initialing of the Coast Agreement on December 17, 1948, gave rise to a "new" cause of action on that date which started the six months' limitation period running, for purposes of Section 10(b), as of December 17, 1948. The Board's position cannot be sustained in view of the undisputed evidence set forth above that the Coast Agreement *became effective upon resumption of operations on December 6, 1948.* The theory that the act of initialing a contract already agreed to and in full operation creates a "new cause of action" for purposes of determining the commencement date of the limitation period is so unfounded as scarcely to merit the dignity of comment.

It is clear that none of the charges were timely filed under Section 10(b) insofar as the complaint sought to predicate any unfair labor practices by WEW, within Sections 8(a) (3), (2) and (1), upon the entering into or execution of the Coast Agreement. Consequently no finding can lawfully be made based upon such allegations.

B. *The charges relating to execution of the Dock Agreement.*

Analysis of the charges and consideration of the evidence establishes that the Dock Agreement, and the hiring provision thereof, was entered into more than six months before *any charge relating thereto* was filed in any of these cases.

The first charges which asserted the invalidity of the Dock Agreement, or mentioned it at all as the basis for any alleged unfair practices, were the charges filed by

Mr. Purnell on September 21, 1949. On that date an amended charge was filed against WEW (R. 21). No charge asserting the invalidity of the Dock Agreement was filed by Crum against WEW until his amended charge was filed on December 1, 1950 (R. 17).

It is apparent that the amended charges which alleged the execution of the Dock Agreement as unfair labor practices were filed more than six months after execution of the Dock Agreement, which was entered into on February 26, 1949 (R. 296, 226). It is also clear that the introduction of the execution of the Dock Agreement as an alleged unfair labor practice against WEW, under the guise of an amendment, actually introduced a wholly new and unrelated cause of action.

A charge which introduces new and unrelated matters will not "relate back" to the date of the original charge for the purpose of fixing the limitation period under Section 10(b). *Joanna Cotton Mills Co. v. N. L. R. B.,* 176 F.(2d) 749 (CA 4, 1949). New and unrelated matters introduced in an amended charge must have been committed not more than six months before the amended charge is served and filed. *N. L. R. B. v. Globe Wireless, Ltd.,* 193 F.(2d) 748 (CA 9, 1951); *Indiana Metal Products Corp. v. N. L. R. B.,* 202 F.(2d) 613 (CA 7, 1953).

The purported "amendment" here falls squarely within the rule established in the *Globe Wireless* case, *supra.* It is elementary that a cause of action commenced under one contract cannot be "amended" to assert a cause of action on a totally new and unrelated contract if the statutory period of limitations has run on the second contractual action.

For the reasons stated, the "amended" charges asserting unfair labor practices by virtue of the execution of the Dock Agreement were not timely filed under Section 10(b) as against WEW. The complaint could not lawfully issue on the basis of those charges, and the Board's findings and conclusions that WEW engaged in unfair labor practices by virtue of the execution of the Dock Agreement cannot be sustained.

II. The Board improperly found and concluded that Crum and Purnell were discriminated against in violation of Sections 8 (a) (3) and 8 (a) (1), that such discrimination is attributable to WEW, and that Local 19 and ILWU caused such discrimination in violation of Section 8 (b) (2) and 8 (b) (1) (A).

Sections 8(a) (1) and (3) provided as follows at times material to these cases:

> "Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> "(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7;
>
> " * * *
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the

thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

The Board has asserted in these cases that the Coast Agreement and Dock Agreement each contained preferential hiring provisions unlawful because beyond the permissible limits prescribed in Section 8(a) (3).

Even assuming *arguendo* that the hiring provisions are unlawful, the mere existence of such provisions in an agreement does not establish a case of discrimination against a specific individual who is discharged or refused employment. An individual does not himself suffer discrimination within the meaning of the Act unless he himself is discharged or refused employment

because of union considerations or because of his participation in concerted activities protected under the Act. The Act is not punitive in nature but remedial.

> *Consolidated Edison Co. v. N. L. R. B.,* 305 U.S. 197, 235-36;
>
> *Republic Steel Corp. v. N. L. R. B.,* 311 U.S. 7, 10-12.

It does not purport to assess penalties, in the form of back pay or otherwise, against employers or unions which enter into unlawful union security arrangements.

The illegality of a contract provision and its general enforcement is one thing. The specific application of the illegal contract provision to an individual is quite another. A finding of discrimination against Crum and Purnell, or either, can only be supported by substantial evidence that the application of the unlawful contract provision resulted in discrimination against them in a "concrete victimizing instance." *Phelps Dodge Corp. v. N. L. R. B.,* 313 U.S. 177, 188. Such a finding cannot be established by the mere showing that unlawful hiring provisions exist.

Nor can the Board indulge in speculation, assumption and surmise that an unlawful hiring provision will be applied by the parties to effectuate discrimination against individuals. It is obvious that an unlawful hiring provision might be inserted in an agreement, yet all hiring practices thereunder in fact be perfectly lawful. In the words of one court,

> "It is not sufficient for the Board to show that the system is capable of being used discriminatorily. It must go further and show that * * * the dis-

> crimination was because the employee upon whom the system was thus used was a union man and the discrimination was because of his union activities." *Interlake Iron Corp. v. N.L.R.B.,* 131 F.(2d) 129, 133 (CCA 7, 1953).

The findings and conclusions of the Board that Crum and Purnell, or either of them, were discriminated against within the meaning of the Act, are not supported by substantial evidence on the record considered as a whole. See *Universal Camera Corp. v. N. L. R. B.,* 340 U.S. 474; *N. L. R. B. v. Pittsburgh S. S. Co.,* 340 U.S. 498.

A. *Neither Crum nor Purnell was discriminatorily refused dispatch through the Seattle hiring hall.*

Substantial evidence on the record considered as a whole does not support a finding that either Crum or Purnell was discriminatorily refused dispatch through the Seattle hiring hall. As stated by the Trial Examiner in these cases, "In order for there to be found discriminatory refusal to employ, it is axiomatic that the individual workman must have been an applicant for employment for obviously a man cannot be refused employment where he has not applied for it" (R. 93). This same principle has been uniformly recognized by the courts. There can be no discriminatory refusal to employ in the absence of a bona fide application for employment in the customary manner. *Sax v. N. L. R. B.,* 171 F.(2d) 769 (CA 7, 1948); *Del E. Webb Const. Co. v. N. L. R. B.,* 196 F.(2d) 841 (CA 8, 1952). No such applications for employment were made by either Crum or Purnell.

1. *The facts relating to Purnell.*

Purnell testified that following the 1948 strike, and probably in early December, 1948, he was advised to appear before the Executive Board of Local 19 (R. 417-18). Upon so appearing, Purnell said he was advised by the President of Local 19 that he was fined for lack of picket duty during the strike (R. 418-20). He was further advised that he had 30 days in which to pay the fine (R. 419-20). Purnell subsequently telephoned Laing, *acting as clerk for the union at the Local 19 office* (R. 425), and was told he had 30 days to work (R. 420-21). Purnell called the Secretary of Local 19 immediately thereafter (R. 421). Purnell was at that time seeking a statement which would enable him to draw unemployment compensation or look for another job (R. 421, 570-73). Purnell testified that he was told *by the Executive Board of Local 19 and by Mr. Clark, Secretary of Local 19,* that "I could work thirty days, and after that, why, I would have to pay my fine before I could work" (R. 422).

Purnell admitted that he did not do *any* longshore work after his appearance before the Executive Board of Local 19 (R. 420). *He further admitted that he made no attempt at all to get work in the normal, customary manner—by appearing at the hiring hall and "plugging in" on the plug board—at any time after his appearance before the Executive Board of Local 19* (R. 420-25, 414-16, 442). Indeed, Purnell made no effort to obtain dispatch following September of 1948 (R. 437).

The practice in the industry has always been for plug

board men to obtain dispatch to employment by personally appearing at the hiring hall and "plugging in" (R. 360-3, 414-16). No provision in the Act attempts to rewrite this established practice. The burden of seeking a job is still upon the job seeker. *Sax v. N. L. R. B.*, 171 F.(2d) 769 (CA 7, 1948). The evidence is undisputed that Purnell was at all times a registered longshoreman (R. 507-10), and that his name remained at all times on the plug board at the hiring hall (R. 507-10, 569-70). He has at all times been eligible for dispatch to work opportunities under the rules established by the Port Labor Relations Committee (R. 477-78, 507-8, 514, 569-70). Purnell simply made no effort to obtain dispatch.

The Trial Examiner correctly concluded from the evidence that it would be pure speculation and surmise to find that Purnell would not have been dispatched had he "plugged in" on the board in the usual fashion (R. 93). This is indeed an understatement.

The Board disagreed with the Trial Examiner, concluding that Purnell was discriminatorily refused dispatch (R. 142-7), despite the fact, as pointed out above, that Purnell *admitted* he never attempted to plug in to obtain dispatch, and that there is no evidence whatever that Purnell ever contacted *a dispatcher* or was refused dispatch *by a dispatcher.* Unjustified speculation and conjecture are not substitutes for proof. As this Court recently said, "The Board is not permitted to arrive at conlusions based on such speculations." *N. L. R. B. v. Amalgamated Meat Cutters,* 202 F.(2d) 671 (CA 9, 1953).

No finding that Purnell was discriminatorily refused dispatch from the hiring hall can be sustained. Purnell was at all times a member of Local 19 and ILWU so far as this record indicates. He was at all times a registered longshoreman and, as a registered longshoreman, was entitled to dispatch through the hiring hall. Purnell made no effort to secure dispatch at any time material to these cases.

2. *The facts relating to Crum.*

Following the maritime strike of 1948 (September 1 to December 6, 1948) Crum appeared before the Executive Board of Local 19 at its union hall. The Executive Board assessed a fine against him for failure to picket during the strike (R. 367-70). Crum was advised by Hopkins, President of Local 19 (R. 368), that he would have 30 days in which to pay the fine and Hopkins further advised Crum that "you will be taken off the work list from this date on until the fine is paid" (R. 370). Crum was subsequently informed by Bill Clark, then Secretary of Local 19, that he could not work until the fine was paid (R. 371). He was, however, shortly thereafter advised by Bill Gettings, Regional Director for ILWU, that under the union constitution he could work for 30 days (R. 371-2, 402, 403). Crum then continued to work with the gang until January 27, 1949, at which time the gang was laid off because work terminated (R. 373, 404). Crum testified that the next day he called the dispatching hall and was advised that his gang was not working pursuant to the earnings equalization system (R. 374). This kept on for three or four days. Crum testified that he then

called the dispatching office and was told *by an unidentified person:* "Crum, there is no need of your calling up any more. There is a bug behind your name, and you won't be dispatched with your gang until the fine is paid" (R. 374-5).

Crum admitted that he made no effort thereafter to contact a dispatcher or the dispatching hall to obtain dispatch (R. 391-2), although he knew that the customary and invariable practice was to contact the hiring hall by telephone or in person to obtain work orders (R.381-2).

Dispatchers, by the express terms of the Coast Agreement and pursuant to the system established thereunder, are only authorized to act in accordance with rules and regulations agreed upon by the Port Labor Relations Committee (Coast Agreement, §7(b) (3), R. 247). The Port Labor Relations Committee determines the method of dispatching (Coast Agreement, §8, R. 248-9; Dock Agreement, §9, R. 285-6). There are also established in each port "registration lists" of longshoremen under the control of the Port Labor Relations Committee, including the power to make additions to or subtractions from the list (Coast Agreement, §7(c), R. 247-8; Dock Agreement, §8(b), R. 284-5).

During the period from January 27, 1949, to April 20, 1949, Crum was at all times a registered longshoreman (R. 478-82, 498, 505). The evidence is undisputed that, *under applicable rules and practices established by the Port Labor Relations Committee,* Crum was entitled, as a registered longshoreman, to be dispatched during that period to work opportunities as a long-

shoreman or dock worker (R. 477, 508-9, 522-3). Crum himself simply made no real effort to obtain dispatch (R. 391-2).

On April 20, 1949, Crum's name was removed from the registration list by action of the Port Labor Relations Committee because, for some years past, he had been a part-time worker in the industry (R. 479-84). That Crum was only a part-time worker is supported by overwhelming evidence (R. 382-90, 407-10, 483-98). The action of the Port Labor Relations Committee was entirely proper and in accordance with consistent and long-standing policy to have only regular workers as registered longshoremen (R. 482-83). A number of other men were removed from the registration list for the same reason (R. 501-4). The Trial Examiner concluded that the removal of Crum's name from the registration list on April 20, 1949, was entirely justified and in accordance with established policy (R. 89-91, 94-6). The Board disagreed with the Trial Examiner, questioning the "good faith" of the action (R. 150-6). The findings of the Trial Examiner are clearly correct. On issues of this kind involving credibility of witnesses the findings of the Trial Examiner are entitled to considerable weight. *Universal Camera Corp. v. N. L. R. B.,* 340 U.S. 474, 496-7; *N. L. R. B. v. Supreme Bedding & Furniture Mfg. Co.,* 196 F.(2d) 997 (CA 5, 1952); *Ohio Associated Tel. Co. v. N. L. R. B.,* 192 F.(2d) 664 (CA 6, 1951).

The evidence establishes that Crum was a registered longshoreman until April 20, 1949. Under the rules established by the Port Labor Relations Committee he

was entitled, as a registered longshoreman, to be dispatched to work opportunities. Crum made no effort to contact *the dispatchers* or *the hiring hall* to obtain dispatch. Crum simply acquiesced in threats of union officials and what some unidentified person told him over the telephone. There is no showing that Crum was ever refused dispatch *by the dispatchers to an available job.* See *Sax v. N. L. R. B.,* 171 F.(2d) 769 (CA 7, 1948); *Del E. Webb Const. Co. v. N. L. R. B.,* 196 F.(2d) 841 (CA 8, 1952). On April 20, 1949, Crum's name was removed from the registration list by the Port Labor Relations Committee because he had not, for some years past, been making himself regularly available for employment in the industry. The deregistration of Crum on April 20, 1949, was entirely proper and is not proscribed by the Act.

On this evidence, no finding that Crum was discriminatorily refused dispatch from the hiring hall can be sustained.

B. *No representative of WEW had knowledge of, acquiesced in, or consented to any alleged refusal to dispatch Crum or Purnell.*

Section 8(a) (3) only proscribes discrimination based upon union or nonunion considerations or because of participation in concerted activities protected by the Act. Since the very inception of the Act, the Board and courts have uniformly held that no finding of discrimination can be made unless it be established that the employer *had knowledge of* the union or concerted activities involved. "Discrimination involves an intent to distinguish in the treatment of employees on

the basis of union affiliations, or activities, thereby encouraging or discouraging membership in a labor organization, * * * " *Botany Worsted Mills,* 4 NLRB 292, 300. See also *Midland Steel Products Co.,* 11 NLRB 1214, 1225; *Tupelo Garment Co.,* 7 NLRB 408, 414; *Hills Brothers Co.,* 76 NLRB 622, 629; *B. F. Goodrich Co.,* 88 NLRB 550, 552-3; *N. L. R. B. v. Westinghouse Electric Corp.,* 179 F.(2d) 507 (CA 6, 1949); *Tampa Times Co. v. N. L. R. B.,* 193 F.(2d) 582 (CA 5, 1952); *Progressive Mine Workers of America v. N. L. R. B.,* 187 F.(2d) 298 (CA 7, 1951); *Brown v. National Union of Marine Cooks and Stewards,* 104 F. Supp. 685 (N.D. Calif., 1951).

There is no evidence that any representative of WEW had knowledge of any alleged refusal to dispatch Crum or Purnell, or anyone, through the hiring hall because of any union-assessed fines against him. While Crum testified that he contacted Mr. Cornell, a representative of both PMA and WEW, presumably in February, 1949 (R. 390), and advised Cornell that he had been fined by the union, Crum stated clearly that he advised Cornell that the reason he was contacting him was *only* that he "wanted to see if there was anything that the Waterfront Employers could do to have me reinstated in good standing with the Local" (R. 376). There is no evidence that Crum advised Cornell, at any time, that he had not been dispatched.

Purnell also contacted Cornell and, according to Purnell's own testimony (R. 429): "I asked Mr. Cornell was my record clear with the Waterfront Employers. I was fined, and I thought that I had always did my

work, and I just wanted to know. I didn't understand why I was fined, and I just wanted to know if my record was clear with the Waterfront Employers, and he told me, 'Yes.' He looked up my record, and he told me that my record was clear with him."

It is indeed inconceivable that the Board, from such testimony, could find in its Decision (R. 150) that Cornell " * * * according to the credible testimony of Purnell, had been advised that *Purnell was being denied dispatching rights because he had not paid the fines assessed by the Union.*" (Emphasis supplied.) Suffice it to say that there is no basis whatever for such a finding. Purnell, according to his own testimony, did not advise Cornell that he had been denied dispatching rights.

Nor can it be said that WEW, or any employer, acquiesced in or consented to any *system* as a result of which either Crum or Purnell was discriminatorily refused dispatch. The system contemplated and established under the Coast and Dock Agreements provided for registered lists of longshoremen in each port under the control of the Port Labor Relations Committee (R. 248, 284, 474, 477-8). The Committee likewise determined methods of dispatching (R. 248-9, 285-6). A longshoreman whose name appeared on the registered list in the Port of Seattle is and was entitled to dispatch from the hiring hall as a longshoreman or dock worker (R. 477-8, 507-8, 514, 569-70). Dispatchers are authorized to act only in accordance with rules and regulations established by the Port Labor Relations Committee. There is no evidence that the Port Labor Rela-

tions Committee or employer members thereof established or consented to any rule whereby registered longshoremen fined by the union for lack of picket duty were to be refused dispatch. There is no evidence that any employer members of the Port Labor Relations Committee gave any instructions to the dispatchers not to dispatch Crum during the period from January 27, 1949, to April 20, 1949 (R. 498-9), or that they gave any instructions not to dispatch Purnell (R. 509).

Purnell and Crum were refused dispatch, if at all, only upon unilateral, unauthorized instructions to the dispatchers given by Local 19 or ILWU and completely apart from and outside of the system of dispatching established by the Port Labor Relations Committee pursuant to the agreements. WEW did not have knowledge of, acquiesce in, consent to, or ratify any such unauthorized action. If refusals to dispatch Crum or Purnell occurred, the dispatchers in taking such action, were *in fact* acting as agents of Local 19 and ILWU only, and were not acting as agents of the employers or within the scope of their authority under the dispatching system established by the Port Labor Relations Committee.

The most that this record indicates is that certain alleged coercive action was taken against Crum and Purnell in December of 1948, or January or February, 1949, by Local 19 and ILWU. The action was purely the unilateral, unauthorized action of the unions in which Crum and Purnell apparently acquiesced.

The evidence will certainly not support the conclusion that WEW engaged in discrimination against

Crum or Purnell *to encourage or discourage union membership* within the meaning of Section 8(a) (3) and (1), or that Local 19 and/or ILWU caused WEW to discriminate against Crum or Purnell within the meaning of Sections 8(b) (2) and8(b) (1) (A). The portions of the Board's order predicated thereon cannot be enforced.

In *Progressive Mine Workers of America v. N.L.R.B.,* 187 F.(2d) 298 (CA 7, 1951) the court held that an employer could not be charged with discrimination against two individuals where the employer had no knowledge of coercive action by the union against them, and was not shown to have acquiesced therein or consented thereto. The court said at pp. 304, 306:

> " * * * And there is no proof that the company was requested by the Unions or any of their officials to discriminate against Chandler and Smith by discharge or otherwise.
>
> " * * *
>
> " * * * On what theory an employer may be held liable for an unfair labor practice perpetrated by a union or its officials, in the absence of any assistance, encouragement or collaboration, is not discernible to us. In theory at least, the employer and the union occupy adverse positions and neither, in our view, is liable for the acts of the other where each is pursuing its independent course. The company had no means of preventing the proscribed activities on the part of the Unions and it was without authority to punish, chastise or reprimand the Unions and their officials for their activities. Any action which it might have taken along this

line would in all probability have been branded as an unfair labor practice against the Unions.

" * * *

"The Board's request for the enforcement of its order will be allowed insofar as it rests upon the conclusion that the Unions violated Sec. 8(b) (1) (A) and, derivatively, Sec. 7 of the Act. In all other respects its request for enforcement is denied. More particularly, that portion of the Board's order which rests upon its conclusion that the company constructively discharged employees Chandler and Smith in violation of Sec. 8(a) (3) and, derivatively, 8(a) (1) of the Act, and that portion of its order which rests upon its conclusion that the Unions violated Sec. 8(b) (2) of the Act, are set aside."

III. The Board Improperly Found and Concluded that WEW Was Responsible for Alleged Discrimination Against Crum and Purnell.

WEW does not hire or employ longshoremen or dock workers (R. 225-6). As an association WEW has always been a distinct and separate entity from Waterfront Employers Association of the Pacific Coast and its successor, PMA. The administration of the Coast and Dock Agreements has always been a function of the Coast Association—now of the PMA—and prior to its existence, of Waterfront Employers' Association of the Pacific Coast. WEW has not participated in the administration or enforcement of the Coast or Dock Agreements, or in the maintenance or operation of the hiring hall in Seattle, or in the functions of the Port Labor Relations Committee for Seattle. The facts relating to the hiring hall structure and administration

of the hiring halls have been set forth in detail herein and are substantially undisputed (*supra,* pp. 6-9). It is likewise clear that no representative of WEW had knowledge of, acquiesced in, or consented to the alleged refusal to dispatch Crum or Purnell, if any such refusal occurred (*supra,* pp. 39-44).

WEW was a signatory party to the Dock Agreement (R. 268, 296) and was named as a contracting party in the Coast Agreement (R. 229). Aside from this, WEW had no connection whatever in actual practice with the administration or enforcement of the agreements, with the functioning of the Port Labor Relations Committee, or with the operation of the hiring hall in Seattle.

Under these circumstances it is difficult to perceive upon what theory the Board can attribute to WEW responsibility for alleged discrimination against Crum and Purnell. It is commonplace that an association cannot be found responsible for violating the Act in the absence of evidence that the association directly participated in the activities or events which serve as the basis for the charge of violation. *G. W. Hume Company,* 71 NLRB 533; *Holtville Ice & Cold Storage Company,* 51 NLRB 596; *N.L.R.B. v. Hearst,* 102 F.(2d) 658 (CCA 9, 1939). To hold otherwise is to give to the Act a punitive effect wholly without precedent. The Act is remedial in nature, not punitive, insofar as it empowers the Board to order affirmative action. *Republic Steel Corp. v. N.L.R.B.,* 311 U.S. 7, 12; *Consolidated Edison Co. v. N.L.R.B.,* 305 U.S. 197, 235-36.

The Board's conclusion that WEW is responsible

for any alleged discrimination against Crum and Purnell cannot be sustained; and the terms of the Board's order (R. 158-161) cannot be enforced insofar as the order directs WEW to (1) jointly and severally with respondent unions, or in any manner, make whole Crum and Purnell for any loss of pay whatsoever; (2) take any measures to restore to Crum and Purnell, or either of them, any dispatch privileges of the hiring hall; (3) send any notices and/or requests whatsoever to the Port Labor Relations Committee (in which WEW does not participate), or to the hiring hall dispatchers at the Seattle hiring hall (over whom it exerts no control), or to any employers of employees covered by the Coast or Dock Agreements (some of whom are not members of WEW); (4) invoke its powers with respect to its members to discharge any financial obligations under the order or to insure cooperation of each or any such employer in effectuating the terms of the order; or (5) post any notices in its business offices or in the hiring hall.

IV. The Board Improperly Found and Concluded That WEW Engaged in Unfair Labor Practices Within the Meaning of Sections 8(a) (1), (2) and (3) by Enforcement of the Coast and Dock Agreements.

The Board asserts (Petitioner's Brief, p. 25) that even if the unfair labor practice charges based on *execution* of the Coast and Dock Agreements be deemed untimely under Section 10(b), WEW engaged in violations of Sections 8(a) (1), (2) and (3) by enforcing the preferential hiring provisions of the Coast and Dock Agreements. No such allegation was contained

in the complaint, the gravamen of the violations therein alleged (R. 36, 37) being the "entering into" of the Coast and Dock Agreements and the alleged enforcement of the agreements *against Crum and Purnell.*

We have heretofore pointed out that neither Crum nor Purnell was refused dispatch, discriminatorily or otherwise, through the hiring hall and that WEW did not participate in the operation or maintenance of the hiring hall, or in the administration or enforcement of the agreements. Furthermore, no evidence was offered at the hearing and there is none in the record establishing any "general" practice of *enforcing* the preferential hiring provisions by WEW.

Consequently, the conclusion of the Board that WEW violated Sections 8(a) (1), (2) and (3) of the Act by enforcing the Coast and Dock Agreements cannot be sustained, and the portions of the Board's order predicated thereon cannot be enforced.

V. If Crum and Purnell, or Either of Them, Were Discriminated Against Within the Meaning of the Act, the Board Erred in Failing to Find That Local 19 and ILWU Were Primarily Responsible Therefor and to Order Affirmatively That Local 19 and ILWU Should Be Solely Liable for Back Pay.

The Board order in these cases directs that WEW, jointly and severally with Local 19 and ILWU, make whole Crum and Purnell for any loss of pay they may have suffered as a result of the alleged discrimination against them (R. 156-7, 158-9).

The power of the Board to assess back pay liability stems from Section 10(c) of the Act. That section, as

amended in 1947, provides that when the Board finds that a union or employer has engaged in an unfair labor practice it shall—

> " * * * issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided, that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him*: * * * ." (Emphasis supplied).

The italicized portion of Section 10(c) quoted above was added by Congress in 1947 to clarify the remedial powers of the Board following insertion in the Act of Section 8(b) setting forth and defining union unfair labor practices. Following 1947 the Board has held unions liable for back pay only upon a finding that a union, in violation of Section 8(b) (2), has caused an employer to discriminate against an employee within the meaning of Section 8(a) (3). See *Colonial Hardwood Flooring Co.,* 84 NLRB 563. Where both union and employer are parties to the proceedings, the Board has failed and refused to assess responsibility for discrimination in any case solely against a union but has imposed a rule of joint and several liability against both employer and labor organization. *H. M. Newman,* 85 NLRB 725; *Acme Mattress Co., Inc.,* 91 NLRB 1010. See *N.L.R.B. v. Pinkerton's National Detective Agency, Inc.,* 202 F.(2d) 230 (CA 9, 1953).

This policy of the Board runs directly counter to the

clear legislative mandate set forth in the proviso to Section 10(c) that: "* * * back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him * * * ." The statute clearly directs the entering of a back pay order against the employer *or* labor organization, *as the case may be, responsible* for the discrimination, and in effect *directs the Board to determine the responsible party or parties* upon the facts of the particular case. The legislative history demonstrates the intent of Congress. In *House Report* No. 245 on H.R. 3020, 80th Cong., 1st Sess., the Committee Report stated at page 42 that under the above quoted clause of amended Section 10(c) "* * * the Board may also require a union to reimburse to an employee whom it causes to lose pay the amount that he loses." In *Senate Report* No. 105 on S. 1126, 80th Cong., 1st Sess., the Committee Report stated at page 26 with respect to amended Section 10(c) that "Back pay may be required of either the employer or the labor organization, depending upon which is responsible for the discrimination suffered by the employee." *House Conference Report* No. 510 on H.R. 3020, 80th Cong., 1st Sess., at page 54 referred to the amended Section 10(c) as containing a provision "* * * authorizing the Board to require a labor organization to pay back pay to employees when the labor organization was responsible for the discrimination suffered by the employees."

On the basis of the record in this case it is manifest that Local 19 and ILWU were solely responsible for

discrimination, if any, suffered by Crum and Purnell, or either of them. Under the mandate of Section 10(c), Local 19 and ILWU should be found solely responsible for such discrimination and directed to make Crum and Purnell whole for *all* resulting loss of wages, if any. WEW had no knowledge of any alleged refusal to dispatch Crum or Purnell, and did not participate or acquiesce therein. Furthermore, the coercive acts of the unions were wholly outside the framework of the hiring system established under the contracts here involved.

West Coast maritime unions have continuously insisted that the hiring hall is a basic and fundamental prerequisite of any collective bargaining agreement. In this case the record clearly establishes that, if discrimination occurred, it came about solely through coercive action of the unions. It is therefore entirely proper, and will effectuate the purposes of the Act, to assess back pay liability, if any, where responsibility lies — solely against the unions. Such an order would appropriately require unions to assume responsibility for insuring that the hiring system, in which they have demanded and assumed a leading role, operates free from union coercion.

The employer is effectively foreclosed by the Act from meddling in intra-union affairs or even from inquiring about union or nonunion status of employees or prospective employees. Meddling and interrogation of employees on such issues by employers are in themselves unfair labor practices. It is therefore difficult

to understand how the Board order in this case can have any effect other than to compel the employer to inject himself into intra-union affairs or to ascertain by interrogation or otherwise the union status of his employees. Such a result hardly comports with the underlying purposes of the Act. See *N.L.R.B. v. Westinghouse Electric Corp.*, 179 F.(2d) 507 (CA 6, 1949).

Realistically, the coercive action of the union against its own members is the primary problem involved in this case. If discrimination occurred as alleged, the basic purposes of the Act can be effectuated only by assessing back pay liability solely against the unions as the parties in fact responsible. This result is clearly contemplated by the proviso to Section 10(c).

We see nothing sacrosanct about the "joint and several liability" formula consistently applied by the Board. See *Acme Mattress Co., Inc.*, 91 NLRB 1010. The Board is charged with the administration of the Act and with the administrative function of ordering a remedy which *will effectuate the purposes of the Act.* The remedies are not fixed and static but are fluid and adaptable to meet the facts of particular cases. The courts have never failed to refuse to enforce Board orders where the remedy directed fails to effectuate the purposes of the Act. *N.L.R.B. v. Fansteel Met. Co.*, 306 U.S. 240; *Southern S. S. Co. v. N.L.R.B.*, 316 U.S. 31; *Indiana Desk Co. v. N.L.R.B.*, 149 F.(2d) 987 (CCA 7, 1945); *N.L.R.B. v. Westinghouse Electric Corp.*, 179 F.(2d) 507 (CA 6, 1949).

VI. If Discrimination Occurred Against Crum, the Board Erred in Ordering Him Reinstated to Dispatching Privileges and in Ordering That He Be Made Whole for Loss of Earnings, if Any, Following April 20, 1949.

Without prejudice to its position elsewhere asserted herein, it is the position of WEW that, even assuming Crum was discriminated against, the Board erred in entering an unconditional reinstatement and back pay order in his favor.

On April 20, 1949, Crum's name was removed from the registration list by the Port Labor Relations Committee because he was a part-time worker in the industry (R. 479-84). This action was entirely proper in view of his work record (R. 382-90, 407-10, 483-98) and consistent with a long-standing, non-discriminatory policy of the Port Labor Relations Committee (R. 482-3, 501-4).

In view of the removal of Crum's name from the registration list for non-discriminatory reasons on April 20, 1949, the Trial Examiner found and concluded that alleged discrimination against him ended as of April 20, 1949, and that no order of reinstatement at all and no back pay order effective after April 20, 1949, was appropriate (R. 89-91, 94-6, 102, 104). The Board disagreed (R. 150-6), and ordered that Crum be reinstated to hiring privileges and paid back pay following April 20, 1949 (R. 156, 158-9).

The Board's order in this respect cannot be sustained. Crum's name was removed from the registered list on April 20, 1949, along with numerous others, for

non-discriminatory reasons. To order him reinstated to dispatch privileges and to order back pay in his favor following April 20, 1949, in effect makes Crum whole for a discrimination he did not suffer. This is punitive in effect and is entirely contrary to the remedial purposes of the Act. *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 235-36; *Republic Steel Corp. v. N.L.R.B.*, 311 U.S. 7, 10-12.

CONCLUSION

WEW requests that the Court enter a decree denying the petition herein and refusing to enforce the Board's order, and setting aside the Board's order in its entirety as to WEW, or, alternatively, that the Board's order be modified in such respects as the same may be found to be improper.

Respectfully submitted,

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APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (29 U.S.C.A. §151, *et seq.*), are as follows:

"DEFINITIONS

"Sec. 2. When used in this Act—

* * *

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * *

"(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

* * *

"RIGHTS OF EMPLOYEES

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in

other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"Unfair Labor Practices

"Sec. 8. (a) It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organiza-

tion is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on

some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * * "

* * *

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, * * * "

* * *

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such

unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * * ''

* * *

''(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the procedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such

transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * ''

Section 8 (a) (3) was amended in part by Public Law 189, 82d Congress, Chapter 534, 1st Session, approved October 22, 1951. The amendment (Section 18 (b)) provided as follows:

''Sec. 18 * * * * * *

''(b) Subsection (a) (3) of section 8 of said Act is amended by striking out so much of the first sentence as reads '; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:' and inserting in lieu thereof the following: 'and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:' ''

* * *